IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC11-2147
L.T. Case Nos. 1D10-3110; 2009-CP-373

JAMES MICHAEL ALDRICH,
Petitioner,

v.

LAURIE BASILE, et al.,
Respondents.

RESPONDENTS' ANSWER BRIEF ON THE MERITS

KANEY & OLIVARI, P.L.
Jonathan D. Kaney III
Florida Bar No. 23426
Jake@KaneyOlivari.com
Jonathan D. Kaney Jr.
Florida Bar No. 0115251
Jon@KaneyOlivari.com
55 Seton Trail
Ormond Beach, FL 32176
Telephone: (386) 675-0691
Facsimile: (386) 672-7003
ATTORNEYS FOR RESPONDENTS

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STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts is incomplete and selective. Because of that and because of material differences in emphasis, respondents submit the following statement of the case and facts.

This case arose from an adversarial probate proceeding in the Estate of Ann Dunn Aldrich between respondents, Laurie Basile and Leanne Krajewski, and petitioner, James Michael Aldrich, on the parties' cross motions for summary judgment (R. 41-45, 48-55) directed to Aldrich's petition for construction of will (R. 16-23) and respondents' response to same. (R. 24-28).

Decedent died on October 9, 2009, and on the date of death was domiciled in Clay County, Florida. (R.12). Respondents are sisters and are the nieces of decedent from a predeceased brother. (R.20). Aldrich is decedent's surviving brother and is the personal representative of decedent's estate. (R.12).

On April 4, 2004, decedent executed her last will and testament in which she named her sister Mary Jean Eaton as personal representative with a provision that Aldrich should be personal representative in the event Ms. Eaton is unwilling or unable to serve. (R. 21-22). The will appears to be a E-Z Legal Forms "do-it-yourself" will that decedent filled out herself by hand. (R. 21-22, 16). After providing for a personal representative, decedent, under "Section III Bequests:" makes provisions for disposition of her pets and her own funeral arrangements.

(R.21).[1] Then, still under "Section III Bequests", decedent specifically lists the following real and personal property:

> -- House, contents, lot at 150 SW Garden Street, Keystone Heights, FL 32656
> -- Fidelity Rollover IRA 162-583405 (800-544-6565)
> -- United Defense Life Insurance (800-247-2196)
> -- Automobile Chevy Tracker, 2CNDE 13C 916952909
> -- All bank accounts at M&S Bank 2226448, 264679, 0900020314 (352-473-7275)
>
> (R.21).

"Section III, Bequests" then states: "All possessions listed are bequeathed to Mary Jean Eaton PO Box 38 Melrose, Florida. If Mary Jean Eaton dies before I do, I leave all listed to James Michael Aldrich, 2250 S. Palmetto, S. Daytona FL 32119." (R.21). The will does not contain any general devises or a residuary clause or any other dispositive provisions. (R. 21-22, 4-5).

Mary Jean Eaton, however, died in 2007 and left her estate to decedent. "As a result, decedent inherited from her sister's estate certain real property in Putnam County, Florida, and cash which decedent deposited in an account she opened with Fidelity Investments (account number Z46-725579; the "Z account"). . . . [T]his inheritance is property that decedent acquired after she made her will." (R.69). (Finding "c" from the probate court's summary final judgment).

After decedent passed in October 2009, Aldrich was appointed personal representative and on December 9, 2009, he initiated this proceeding by filing his

[1]These provisions are obviously not bequests.

petition for construction of will. (R. 16-23). The petition alleged that "[t]here are two possible constructions of decedent's April 5, 2004 will as it concerns the after-acquired property that decedent inherited from her sister." (R.19). One possible construction alleged by Aldrich "is that decedent intended her entire estate, including after-acquired property, to pass to petitioner." (R.19). The other possible construction alleged by Aldrich is that the will only disposed of "the property *specifically listed in the will*". (e.s.) (R.19). Under the latter scenario, since there is no residuary clause or (applicable) general devise, the after-acquired property would pass under the intestacy statute which would result in ½ of that property passing to Aldrich and the other half passing to respondents. (R. 19-20).

The parties moved for summary judgment. Aldrich's motion sought summary judgment on the issue of whether the will had been properly executed. (R. 48-55). Respondents' motion sought summary judgment on the issue of whether the after-acquired property passed under the will or by intestacy. (R. 41-45). The probate court conducted a hearing on the summary judgment motions on April 29, 2010. At the outset of the hearing, respondents conceded the will was properly executed and the court, thus, granted Aldrich's motion for summary judgment on that issue. (R.86).

On the remaining issue, respondents argued that since the will contains a specific devise and several specific bequests, but no residuary clause, it does not

dispose of the residue, *i.e.*, after-acquired property, and, thus, the residue passes under the intestacy statute. (R. 86-95, 103-105).

Aldrich argued that in light of Section 732.6005(2), Florida Statutes, the after-acquired property passes to him even in the absence of a residuary clause. In the alternative, Aldrich argued the will is ambiguous and the probate court should, therefore, consider extrinsic evidence of decedent's intent.

Respondents argued that Section 732.6005(2) does not apply to wills that contain no residuary clause and only specific devises/bequests. Respondents also argued that the will is not ambiguous. It contains a specific devise and specific bequests, but no residuary clause, and, therefore, the residuary (after-acquired property in this case) passes under the intestacy statute. Respondents further argued that if the lower court were to consider the extrinsic evidence of intent, it would see that the evidence indicates decedent's testamentary intent had changed since she executed the will admitted to probate. (R. 86-95, 103-105).

After hearing argument of counsel, the probate court announced that it was denying respondents' motion on the grounds that Section 732.6005(2) results in all of the property passing to Aldrich. (R.105). The court expressly stated that its ruling was not premised upon the extrinsic evidence tendered by Aldrich. (R.105). Also, even though Aldrich had not moved for summary final judgment on this issue, the parties agreed that the probate court could enter summary final judgment

in his favor as if he had (106-107) so that the issue of whether "this will is sufficient to transfer after acquired property under" Section 732.6005 can be resolved by this Court. (R.106).

Thus, the issue on the cross motions for summary judgment in the probate court was whether the residue would pass to Aldrich even though the will contained no residuary clause. Aldrich argued that by operation of Section 732.6005(2), Florida Statutes, the residue, since it was after-acquired property, passed to him. Respondents argued that Aldrich misunderstood the import of that statute and that the residue passed by intestacy by operation of Section 732.101(1), Florida Statutes ("Any part of the estate of a decedent not effectively disposed of by will passes to the decedent's heirs as prescribed in the following sections of this code.").

The probate court agreed with Aldrich. In its summary final judgment, the court considered argument of counsel and "the summary judgment evidence in the record" and found there is no genuine issue as to the following facts:

> a. The last will of decedent, Ann Dunn Aldrich, dated April 5, 2004, was executed and attested in conformity with the requirements of Section 732.502(1), Florida Statutes.
>
> b. The will devised decedent’s property to her sister, Mary Jean Eaton, or, if her sister died before her, then to decedent’s brother, James Michael Aldrich, who is the petitioner in this proceeding.

> c. Ms. Eaton died in 2007 and left her estate to decedent. As a result, decedent inherited from her sister's estate certain real property in Putnam County, Florida, and cash which decedent deposited in an account she opened with Fidelity Investments (account number Z46-725579; the "Z account"). The parties agree, and the summary judgment evidence shows, that this inheritance is property that decedent acquired after she made her will.
>
> d. Decedent still owned the Putnam County property and the Z account at her death.
>
> e. The will is silent as to the disposition of any after-acquired property.
>
> f. The Putnam County property has now been sold pursuant to authorization by this Court. The personal representative is holding the sale proceeds in the estate bank account.

The lower court then held, "[b]ased on the foregoing", as follows:

> The Court finds that Section 732.6005(2), Florida Statutes, governs the disposition of decedent's after-acquired inheritance from her sister. That section provides that, unless the will indicates a contrary intention, "a will is construed to pass all property which the testator owns at death, including property acquired after the execution of the will." The Court finds that there is no contrary intention indicated by decedent's will, and therefore Section 732.6005(2) requires that the will be construed to pass decedent's after-acquired inheritance to petitioner. Accordingly, respondent's motion is denied, and summary final judgment is entered for petitioner. The Court hereby construes decedent's will to pass the Putnam County property (including the proceeds of its sale) and the Z account to petitioner.

(R. 68-70).

Respondents appealed to the First District Court of Appeal. On appeal, respondents agreed with findings a, c, d, e and f in the summary final judgment quoted above. Respondents also agreed with finding b to the extent it only pertains to property specifically devised and bequeathed under the will. Whether the residue passes under the will was the issue on appeal.

In its opinion dated August 23, 2011, the First District Court of Appeal rejected the probate court's and Aldrich's interpretation of Section 732.6005(2). It held that since the will did not dispose of the residue, the residue passed by intestacy. The appellate court reversed the probate court's order granting summary judgment to Aldrich and remanded with directions that summary judgment be entered for respondents. The appellate court, however, "[i]n an abundance of caution", certified "the following question as a question of great public importance within the meaning of Article V, section 3(b)(4) of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v):"

> **WHETHER SECTION 732.6005, FLORIDA STATUTES (2004), REQUIRES CONSTRUING A WILL AS DISPOSING OF PROPERTY NOT NAMED OR IN ANY WAY DESCRIBED IN THE WILL, DESPITE THE ABSENCE OF ANY RESIDUARY CLAUSE, OR ANY OTHER CLAUSE DISPOSING OF THE PROPERTY, WHERE THE DECEDENT ACQUIRED THE PROPERTY IN QUESTION AFTER THE WILL WAS EXECUTED?**

Basile v. Aldrich, 70 So.3d 682, 688 (Fla. 1st DCA 2011), reh'g denied (Oct. 6, 2011).

SUMMARY OF THE ARGUMENT

The majority below disagreed with petitioner's and the probate court's interpretation of Section 732.6005(2), but, "[i]n an abundance of caution", certified the question "as a question of great public importance". *Basile v. Aldrich*, 70 So.3d at 688. Petitioner's argument regarding the certified question, if it became law, would turn a long-standing, well-settled principle of the law and practice of estate planning and probate administration on its head and would moot Section 732.101(1), Florida Statutes.

Contrary to the construction urged by petitioner, Section 732.6005(2) does not operate to dispose of property not named or in any way described in the will, despite the absence of a residuary clause or any other clause that could otherwise possibly dispose of the property, under any circumstances, including where the decedent acquired the property in question after the will was executed. Without a dispositive provision through which the after-acquired property can pass, Section 732.6005(2) does not apply and the after-acquired property passes under the intestacy statute.

Accordingly, the Court should answer the certified question in the negative.

ARGUMENT

Standard of Review: Respondents agree that the *de novo* standard of review applies to the legal question certified by the district court of appeal.

I. THE WILL DOES NOT DISPOSE OF THE AFTER-ACQUIRED PROPERTY PURSUANT TO SECTION 732.6005(2), FLORIDA STATUTES, BECAUSE THE WILL CONTAINS NO RESIDUARY CLAUSE OR APPLICABLE GENERAL DEVISES OR BEQUESTS.

Section 732.6005, Florida Statutes, states:

> (1) The intention of the testator as expressed in the will controls the legal effect of the testator's dispositions. The rules of construction expressed in this part shall apply unless a contrary intention is indicated by the will.
>
> (2) Subject to the foregoing, a will is construed to pass all property which the testator owns at death, including property acquired after the execution of the will.

The district court of appeal correctly held that Section 732.6005 does not operate to dispose of the after-acquired property through the will despite the fact the property was not specifically devised and was not otherwise subject to a general or residual devise. In other words, the district court correctly recognized that Section 732.6005(2) does not operate to pass after-acquired property under a will even though the will does not otherwise dispose of the property.

Decedent's will, on page one in a section titled "Section III Bequests", makes a specific devise of her homestead and four specific bequests of personal property. (R.21) The will does not contain any general devises/bequests, a residuary clause,

or any other dispositive provisions. (R.21-22) Accordingly, any property not specifically devised or bequeathed, including after acquired property, passes intestate to all heirs. Section 732.101(1), Florida Statutes ("Any part of the estate of a decedent not effectively disposed of by will passes to the decedent's heirs as prescribed in the following sections of this code."); *In re Stephan's Estate*, 194 So.2d 343 (Fla. 1940) ("A testator may be intestate as to all of his estate or as to a part thereof. The statute of descents applies to any property of a decedent not lawfully disposed of by will or otherwise as provided by law."); *In re: Estate of Barker*, 448 So.2d 28 (Fla. 1st DCA 1984) ("Accordingly, where some property is not disposed of by will, either because of the lapse of proposed legacies or for other reasons, the cases hold that the undisposed-of property will pass to those under the statutes of descent.")

Petitioner, however, urges that the otherwise undisposed of after-acquired property passes under the will by operation of Section 732.6005(2) despite the fact the property was not specifically devised and was not otherwise subject to a general or residual devise.[2] In other words, he argues that the after-acquired

[2]Again, the will does not contain a residuary clause or other general devise. On the contrary, the dispositive provisions of the will consist solely of a specific devise of decedent's homestead and specific bequests of the contents of decedent's homestead, a specified IRA, a specified life insurance policy, a specified vehicle and three specified accounts at a specified bank. *In re: Parker's Estate*, 110 So.2d 498 (Fla. 1st DCA 1959) ("A specific legacy is a gift by will of property which is

property passes under the will pursuant to Section 732.6005(2) even where the will makes no effective disposition of that property.

In effect, petitioner urges a construction of Section 732.6005(2) that would create an exception to the long-standing rule that property not effectively disposed of by a will passes by intestacy. It is well-settled that property passes under a will pursuant to one of four types of devises: specific, general, demonstrative and residuary. *Park Lake Presbyterian Church v. Henry's Estate*, 106 So.2d 215 (Fla. 2nd DCA 1958). If a will does not dispose of property, or purports to but the devise lapses, that property passes by intestacy. *In re: Estate of Barker*, 448 So.2d 28 (1984); *Hurt v. Davidson*, 178 So. 556 (Fla. 1938); *In re: Reid's Estate*, 399 So.2d 1032 (1981); Section 732.101(1) ("Any part of the estate of a decedent not effectively disposed of by will passes to the decedent's heirs as prescribed in the following sections of this code.).

Petitioner's construction of the statute is inescapably and directly at war with Section 732.101(1) and every reported Florida decision that held a testator's estate, in whole or part, for whatever reason, passed by the laws of descent. His construction of Section 732.6005(2) should be rejected. It has never been the law in Florida that property passes under a will no matter what, even if, like here, the will does not contain any provision to dispose of the property. The law in Florida is

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particularly designated and which is to be satisfied only by the receipt of the particular property described.").

that any part of the estate of a decedent not effectively disposed of by will passes to the decedent's heirs. Section 732.101(1). Petitioner cites no case that says otherwise or, for that matter, to support the novel construction he urges this Court to place on Section 732.6005(2).

In support of his argument that Section 732.6005(2) mandates that after-acquired property passes under the will, notwithstanding the absence of a residuary clause, petitioner attempts to distinguish *In re: Estate of Barker*; *In re: Reid's Estate*; and *In re Estate of Scott*, 659 So.2d 361 (Fla. 1st DCA 1995) on the grounds that those cases did not involve after-acquired property. Petitioner's argument, however, ignores the fact that Section 732.6005(2) expressly applies to **all property**, not just after-acquired property. That is, petitioner's construction of Section 732.6005(2) ignores the fact that the section is not limited to after acquired property, but, rather, applies to "all property which the testator owns at death". In order to reach his construction of the statute, petitioner substitutes the illustrative subordinate clause at the end of the sentence that begins with the participle "including", *i.e.* "including property acquired after the execution of the will", for the main clause, *i.e.* "a will is construed to pass all property which the testator owns at death." Petitioner's entire argument is premised upon this grammatical and logical fallacy.

Of course, it is not, nor has it ever been, the law in Florida that **all** property passes under a will even in the absence of applicable dispositive provisions. *See, e.g.*, Section 732.101(1) ("Any part of the estate of a decedent not effectively disposed of by will passes to the decedent's heirs as prescribed in the following sections of this code.); *Hurt v. Davidson*, 178 So. 556 (Fla. 1938) (If a will does not dispose of property, or purports to but the devise lapses, that property passes by intestacy.); *In re Stephan's Estate*, 194 So.2d 343 (Fla. 1940) ("A testator may be intestate as to all of his estate or as to a part thereof. The statute of descents applies to any property of a decedent not lawfully disposed of by will or otherwise as provided by law."); *Park Lake Presbyterian Church v. Henry's Estate*, 106 So.2d 215 (Fla. 2nd DCA 1958) (Property passes under a will pursuant to one of four types of devises: specific, general, demonstrative and residuary); *In re Estate of Guess*, 213 So.2d 638 (Fla. 3rd DCA 1968) ("We [ ] hold that in the absence of an effective residuary clause, a void legacy passes by intestacy to a decedent's heirs at law."); *In re: Estate of Barker*, 448 So.2d 28 (Fla. 1st DCA 1984) ("Accordingly, where some property is not disposed of by will, either because of the lapse of proposed legacies or for other reasons, the cases hold that the undisposed-of property will pass to those under the statutes of descent."); *In re Estate of Scott*, 659 So.2d 361 (Fla. 1st DCA 1995) ("the testator must make a valid disposition of the property passing under the will"); *In re Estate of Corbin*, 645 So.2d 39, 42 (Fla.

1st DCA 1994) ("We conclude that the provision of decedent's will at issue was ineffective as a testamentary disposition. Because the will failed to effectively devise the property to designated beneficiaries, intestacy resulted. § 732.101, Fla.Stat. (1989)"); *see also In re: Reid's Estate*, 399 So.2d 1032 (1981).[3]

Petitioner does not offer any explanation to justify his construction's differential treatment of the sub-class of property referred to by illustration in the second clause of subsection (2), *i.e.*, after-acquired property, from the full scope of subsection (2), *i.e.*, "all property". There is simply no occasion to construe the statute as requiring property in possession of testator at the time testator makes a will and which is not disposed of by the will to pass under the intestacy statute, but, at the same time, requiring property not in the possession of the testator at the time of the will and which also is not disposed of under the will, to, nevertheless, pass under the will. Thus, petitioner's construction of the statute, if it became law,

[3]In *Luxmoore v. Wallace*, 145 Fla. 325, 336-37, 199 So. 492, 496 (1940), this Court explained disposition of property under a will this way:

> In the first place, the very term residuary clause . . . means provision for disposition of what remains in an estate after the distribution of bequests made in a will. A residuary fund is a reservoir in which is placed all that is left of the estate which the testator has failed to dispose of in legacies and devises . . .
>
> 'A residuary legatee is one who receives all the testator's personal estate not otherwise effectually disposed of by his Will. . . . (Citation omitted)

would create an exception that would completely devour the rule set forth in Section 732.101(1). Indeed, petitioner's interpretation of Section 732.6005(2) renders Section 732.101(1) a nullity.

In addition to turning the language of Section 732.6005(2) on its head in order to reach the construction of the statute that he desires, petitioner also offers an abbreviated and distorted version of the history and purpose of the statute. It is important, however, that the Court receive a complete version of the history and purpose of the statute. *E.A.R. v. State*, 4 So. 3d 614, 629 (Fla. 2009), *reh'g denied* (Mar. 2, 2009) ("`As part of this inquiry [into meaning of statute], we must address the legislation "as a whole, including the evil to be corrected, the language, title, and history of its enactment, and the state of law already in existence.' *Bautista v. State*, 863 So.2d 1180, 1185 (Fla.2003) (quoting *State v. Anderson*, 764 So.2d 848, 849 (Fla. 3d DCA 2000))."

Section 732.6005(2)'s predecessor, Section 731.05(2), was enacted to fix the old common law rule whereby after acquired property does not pass under a will. This Court explained this history in its *In re: Vail's Estate*, 67 So.2d 665 (Fla. 1953) and *DePass v. Kansas Masonic Home*, 181 So. 410 (Fla. 1938) decisions. In *In re: Vail's Estate*, the Court explained:

> So much reliance, however, is placed upon Sec. 731.05 (2) that for clarity we refer appellants to the history of that section as outlined in *DePass v. Kansas Masonic Home Corp.*, 132 Fla. 455, 461-463, 181 So. 410, 412-

> 413, where we adopted an opinion by Mr. Justice Sebring (then Circuit Judge) in which he pointed out that prior to June 13, 1892, in Florida, after-acquired property did not pass by will at all, *Frazier v. Boggs*, 37 Fla. 307, 20 So. 245, whereas the Revised Statutes of 1892, Sec. 1794, based in part upon the English Wills Act of 1837, specifically provided that the every will containing a residuary clause should transmit after-acquired property. At the time the *DePass* case was decided, this provision, Sec. 5477(2), 1934, Supp., Compiled General Laws of Florida 1927, was expressed in part as follows: `Every will containing a residuary clause shall transmit after-acquired property, unless the testator expressly states in his will that such is not his intention.' It will be noted that this language is identical with the last sentence of present F.S.A. § 731.05(2).

In *DePass v. Kansas Masonic Home*, 181 So. 410 (Fla. 1938), this Court, in discussing the effect of the precursor to the statute at issue here, described the purpose of the statute in implementing the English Wills Act of 1837 and said: "the provisions of that statute . . . now provide that 'a will becomes effective at the time of the death of the testator and all property, real or personal, acquired by the testator after making his will *is transmissible under general expressions in the will* showing such to be the intention of the testator." (e.s.). The Court noted that the statute allows after acquired property to pass "*by a general devise*" and that "[u]nder the Florida statute, *a general devise* will now pass, not only the lands which the testator owned at the date of his will, but also those which he acquired after that date."

Thus, the precursor statute was originally enacted to fix the old rule whereby after-acquired real property would not pass under a will. It was then changed to provide, in part: "all property, real or personal, acquired by the testator after making his will is transmissible under general expressions in the will showing such to be the intention of the testator." While the prior statute provided that after-acquired property could pass under a will pursuant to "the general expressions in the will", *i.e.*, under a general or residual devise, it did not, however, create an exception to the rule that a will must, nevertheless, dispose of property in order for it to pass under the will. That is, the statute did not mean that after-acquired property passes under a will no matter what.

This is still the law in Florida. Today's Section 732.6005(2) was enacted as part of the legislature's 1974 enactment of the Florida Probate Code ("FPC"). The FPC was organized and generally structured along the lines of both the Uniform Probate Code ("UPC") and existing Florida statutes. *Velde v. Velde*, 867 So.2d 501 (Fla. 4th DCA 2004). Again, the existing Florida Statute upon which Section 732.6005(2) was premised was Section 731.05(2) discussed above. The UPC section that Section 732.6005(2) was modeled after is Section 2-602, which provides: "A will may provide for the passage of all property the testator owns at death and all property acquired by the estate after the testator's death." The section

does not say that after-acquired property *shall* be disposed of under a will. On the contrary, it simply states that a "will *may* provide for passage of all property."

Thus, neither of the sources from whence Section 732.6005(2) derived purported to create an exception to the rule that in order for property, after-acquired or not, to pass under a will, the will must dispose of it somehow. A will still has to have a way to dispose of such property through one of the four types of devises. If this weren't so, then *In re: Barker; Reid* and *In re: Estate of Scott*, 659 So.2d 361 (Fla. 1st DCA 1995) would have been decided differently.

While Aldrich argues that *In re: Barker* was distinct since it did not involve after-acquired property, that is a distinction without any meaningful difference. Even if the facts of *In re: Barker* involved after-acquired property, the result would have been no different since there was no general devise or residuary for such hypothetical after-acquired property to pass through.

Thus, it was always understood that a will must otherwise dispose of property, including after-acquired property, in order for the statute to have any effect. If a will does not contain "general expressions" through which the after acquired property is transmissible, then after acquired property will not pass under the will and Section 732.101(1) would control. Section 732.6005(2) does not operate to authorize courts to re-write wills to include "general expressions" (*i.e.*, general devises/bequests and/or residuary clause) where none otherwise exist.

Petitioner argues that the district court improperly re-inserted the words “residuary clause” into Section 732.6005(2). In support of this argument, petitioner offers a lengthy (well-written) essay on certain statutory construction rules. In essence, however, petitioner’s argument here is a form over substance attempt to change the meaning of the statute and is clearly wrong.

To support his argument, petitioner points to the fact that the 1974 version of the statute, adopted when Florida adopted the model code, dropped the words "residuary clause" from the statute. Grammatically speaking, however, the act of dropping two words from the last clause of a sentence did not change the meaning of the first clause. The use of the participle “including” that precedes "property acquired after execution of the will" merely implies an illustrative application of the scope of the statute. It does not define it. The scope of the statute is not limited to after-acquired property. On the contrary, it expressly applies to "all property". Section 732.6005(2). Again, there is simply no occasion to construe the statute as requiring property in possession of testator at the time testator makes a will and which is not disposed of by the will to pass under the intestacy statute, but, at the same time, requiring property not in the possession of the testator at the time of the will and which also is not disposed of under the will, to, nevertheless, pass under the will. Accordingly, dropping the words "residuary clause" from the last clause in

subsection (2) back in 1974 was not a material change in the language of the statute.

Nevertheless, in support of his argument petitioner points to the rule of statutory construction that when an amendment to a statute omits words courts must presume that the legislature intended the statute to have a different meaning than before the amendment. Petitioner concludes this point by arguing that respondents' argument that Section 732.6005(2) requires a residuary clause to pass after-acquired property under a will is nothing more than an attempt to reinsert through implication language that was expressly omitted by the legislature in 1974.

In fact, petitioner's argument here is premised upon an unreasonable assumption. Specifically, petitioner assumes that the words were removed with the effect of (fundamentally changing Florida law by) allowing(, for the first time,) after-acquired (or any) property not otherwise disposed of by dispositive provisions in a will to, nevertheless, pass under the will. For the reasons set forth below, petitioner is clearly wrong.

First, however, respondents agree that, generally, when the legislature makes a substantial and material change in the language of a statute, the courts may presume the legislature intended to change the meaning of the statute. *Town of Lake Park v. Karl*, 642 So.2d 823, 825 (Fla. 1st DCA 1994) ("In making substantial material changes in the language of the present statute, the Legislature is presumed

to have intended some objective or alteration of the law unless the contrary is clear."); *Mangold v. Rainforest Golf Sports Center*, 675 So.2d 639 (Fla. 1st DCA 1996) ("When the Legislature makes a substantial and material change in the language of a statute, it is presumed to have intended some specific objective or alteration of law, unless a contrary indication is clear.").

Respondents respectfully submit, however, that the rule of construction upon which petitioner's argument hinges is not absolute. Indeed, per its terms, if the change in the language of the statute is not material and substantial, then the presumption does not apply. *Mangold*. Moreover, if "a contrary indication is clear", then the presumption does not apply. *Id.* Respondents further submit that, in the context of the state of the law in 1974, the legislature's change to the language of the statute was neither substantial nor material. Moreover, given the then longstanding state of the law, a contrary indication to the presumption that the legislature intended to change the law was clear.

Appellants also respectfully submit that it has long been the law in Florida that the rule of construction relied upon by petitioner is not otherwise unrebuttable. For example, as this Court explained in 1973, an exception to the aforementioned rule is when the legislature changes the language of a statute to correspond to what had previously been assumed to be the law:

> The mere change of language does not necessarily indicate an intent to change the law for the intent may be

> to clarify what was doubtful and to safeguard against misapprehension as to existing law. (Citation omitted). The language of the amendment in 1971 was intended to make the statute correspond to what had previously been supposed or assumed to be the law. The circumstances here are such that the Legislature merely intended to clarify its original intention rather than change the law.

State ex rel. Szabo Food Services, Inc. of N. Carolina v. Dickinson, 286 So.2d 529, 531 (Fla. 1973)[4]; *see also Southeastern Staffing Services, Inc. v. Florida Dept. of Ins.*, 728 So.2d 248, 251 (Fla. 1st DCA 1998) (Amendment can clarify, rather than change, legislative intent.); *Prison Rehabilitative Indus. v. Betterson*, 648 So.2d 778, 779 (Fla. 1st DCA 1994) (The amendment of a statute does not necessarily indicate that the legislature intended to change the law); *Asphalt Pavers, Inc. v. Dep't of Revenue*, 584 So.2d 55, 58 (Fla. 1st DCA 1991) ("[A] mere change in the language of a statute does not necessarily indicate an intent to change the law, because the intent may be to clarify what was doubtful and to safeguard misapprehension as to existing law."); *See also City of New Smyrna Beach v. Bd. of Trustees of Internal Imp. Trust Fund*, 543 So.2d 824, 829 (Fla. 5th DCA 1989) ("Another rule of statutory construction is that the mere change of statutory language does not necessarily indicate an intent to change the

[4]Coincidentally, this pronouncement, in the context of a different statute, came down one year prior to the legislature's adoption of the model code at issue here.

law for the intent may be to clarify what was doubtful and to safeguard against misapprehension as to existing law.").

Respondents submit that the legislature's removal of the words "residuary clause" from subsection (2) of the statute in the 1974 re-write as part of Florida's adoption of the model code merely conformed the language of the statute to comport with then long-standing Florida law, which the legislature was deemed to have been aware of, and which allowed after-acquired property to pass under applicable general devises *in addition to* residuary clauses. *See, e.g., DePass v. Kansas Masonic Home*, 132 Fla. 455, 461, 181 So. 410, 412 (1938) ("Under the Florida statute, a general devise will now pass, not only the lands which the testator owned at the date of his will, but also those which he acquired after that date."). That is, the more plausible reason for the removal of those words was to acknowledge the, by then, longstanding practice of passing after-acquired property through applicable general devises, in addition to, or in the absence of, residuary clauses. In other words, Section 732.6005(2) means what it, and its precursors, have always meant (*i.e.*, the old rule whereby after-acquired property could not pass under a will is abolished in Florida) and that the legislature's removal of "residuary clause" from the statute was merely intended to change the language of the statute to comport with what practitioners and courts already knew it meant, *i.e.*, after-acquired, and therefore not specifically devised or bequeathed property,

can pass under applicable general devises and bequests *in addition to* residuary clauses.

Moreover, respondents further submit that if the legislature intended to make such a fundamental change to will drafting and construction so as to allow property, for the first time, to pass under a will even where the will contains no dispositive provisions through which the property could pass, the legislature would have expressly said so rather than merely, in the context of adoption of an entire model code, drop two words, especially where dropping those two words resulted in the statute conforming with longstanding practice and precedent. Indeed, the statute never has, and still does not, expressly refer to the black-letter, axiomatic requirement that a will must dispose of property in order for property to pass under the will. That has never been the purview of the statute.

Respectfully, then, the presumption that petitioner urges, *i.e.* that the legislature's omission of "residuary clause" in its 1974 re-adoption of the statute sub-silencio created an exception for "after-acquired property" to the aforementioned axiomatic rule, is less likely than the "comport with Florida law" presumption suggested herein. This is particularly so given that there is no legislative history to support the conclusion that the legislature intended such a radical change in Florida estate planning and probate law.

In short, that the legislature dropped the "residuary clause" language from the statute when it adopted the model code in 1974 did not convert the meaning of the statute from that of implementing the English Wills Act of 1837 into a new exception that would eat the rule that a will must effectively dispose of property in order for property to pass under the will. The statutory "residuary clause" language was obviously surplusage since the statute does not, and never did, purport to eliminate the requirement that a Will otherwise dispose of property. *DePass v. Kansas Masonic Home*. And, of course, the 1974 act did not convert the statute itself into a dispositive provision. Accordingly, respondents submit that the more likely presumption is that the legislature intended to change the language of the statute to say what practitioners and courts already knew it meant. *See*, *e.g.*, *DePass*.

In addition to the above, petitioner's construction of Section 732.6005 also ignores the import of the first sentence in subsection (1), *i.e.*, "[t]he intention of the testator as expressed in the will controls the legal effect of the testator's dispositions." Indeed, the reach the construction he urges, petitioner re-phrases the statute to provide that unless the will indicates a contrary intent, a will is construed to pass all after-acquired property which the testator owns at death.

Petitioner's re-write of the statute is clearly not proper. Subsection (2) of the statute is *subject to* the subsection (1) language, not the other way around. That is,

the subsection (2) "all property passes" language is subject to the subsection (1) language that "[t]he intention of the testator *as expressed in the will* controls the legal effect of ***the testator's dispositions***." Section 732.6005(1) (e.s.). Subsection (1), then, subjects subsection (2) to "the testator's dispositions." That is, subsection (1) assumes that the testator must make dispositive provisions in order to pass property, after-acquired or not, under the will. This is the only construction that makes sense given the existence of Section 732.101(1). Moreover, each of the rules of construction relied upon by petitioner assume that property can only pass under a will pursuant to an effective dispositive provision.

Petitioner also argues that decedent's will disposed of all the assets she owned at the time she executed the will and that she, therefore, chose by her will to dispose of her entire estate. He also argues that she did not expect to ever acquire other assets. That is a patently unreasonable assumption and there is exactly zero evidence to support it. In fact, common experience demonstrates that people tend to acquire property throughout their lifetimes. Insofar as the decedent was concerned, she knew her sister was still alive and that she was, at least, a possible heir to her sister's estate.

In any event, petitioner is clearly wrong on this point as well. A will is to be construed according to the intent of the testator as expressed in the will. Section 732.6005(1). If document's meaning is plain and unambiguous, extrinsic evidence

is inadmissible and judicial construction is precluded. *In re: Estate of Barker*, 448 So.2d 28 (Fla. 1st DCA 1984); *Owens v. Estate of Davis, ex rel. Holzauser*, 930 So.2d 873 (Fla. 2nd DCA 2006).

There is nothing ambiguous about the decedent's will. Decedent's will makes a specific devise of her homestead and four specific bequests of personal property. (R.21) It does not contain any general devises/bequests, a residuary clause, or any other dispositive provisions. (R.21-22) Accordingly, any property not specifically devised or bequeathed, including after acquired property, passes intestate to all heirs. Section 732.101(1), Florida Statutes; *In re: Estate of Barker*.

Petitioner relies upon *In re Estate of McGahee*, 550 So.2d 83 (Fla. 1st DCA 1989) in support of his argument that the Court should consider extrinsic evidence in interpreting this unambiguous will, but that case involved interpretation of the incorporation of a separate writing by reference statute and its holding is, therefore, inapposite here. Petitioner also relies upon *In re Estate of Lenahan*, 511 So.2d 365 (Fla. 1st DCA 1987), but that was a latent ambiguity case. Again, there is nothing ambiguous about the will at issue in the present case. Accordingly, *Estate of Lenahan* is also inapposite. As the majority below explained:

> As enunciated by this court in *In re Estate of McGahee,* 550 So.2d 83 (Fla. 1st DCA 1989): "The primary goal of the law of wills, and the polestar guiding the rules of will construction, is to effectuate the manifest intention of the testator." *Id.* at 85 (citing *Marshall v. Hewett*, 156 Fla. 645, 24 So.2d 1 (1945), and *In re Estate of Lenahan*, 511

> So.2d 365 (Fla. 1st DCA 1987)). As earlier emphasized by the supreme court, "[t]he law of wills is calculated to avoid speculation as to the testator's intent and to concentrate upon what he said rather than what he might, or should, have wanted to say." *In re Pratt's Estate*, 88 So.2d 499, 504 (Fla.1956).

Basile v. Aldrich, 1D10-3110, 2011 WL 3696309 (Fla. 1st DCA 2011).

Petitioner also cites *In re Estate of Parker*, 110 So.2d 498 (Fla. 1st DCA 1959) and *In re Howard's Estate*, 393 So.2d 81 (1981), but those cases involved ambiguities as to whether stock bequests included stock after-acquired as a result of stock splits and, thus, have no bearing on the issues present here. It is beyond all reasonable dispute that the after-acquired property at issue in the present case does not fall within any of the very specific bequests contained in decedent's will.

Petitioner argues alternatively that the "fact" decedent's will disposed of everything she had at the time she executed the will creates an ambiguity concerning her intention regarding after acquired property. Petitioner, thus, poses the false choice between whether decedent's will signifies her intent that the will should also operate with respect to property, if any, that she may thereafter acquire; or whether she intended to exclude any such after-acquired property from the operation of the will? First of all, this is a false choice because, most likely, decedent did not consider after acquired at all at the time she executed her will. Otherwise, she would have included a residuary clause. Nevertheless, there is no

occasion to look to extrinsic evidence since the language of the will is plain and unambiguous. *Owens*; *Barker*.

Second, petitioner relied upon *Scheurer v. Tomberlin*, 240 So.2d 172 (Fla. 1st DCA 1970) in support of this point, but that is also a latent ambiguity case. Again, the present case is not since there is nothing ambiguous about decedent's will. The extraneous fact petitioner points to does not cause application of the words in decedent's will to be impractical. On the contrary, even if her will disposed of all property she had at that time, that fact does not make application of any provision in her will impractical. *Tomberlin*, which involved a will that devised assets to grandchildren where the testator had none, is inapposite. The Court should reject petitioner's invitation to manufacture an ambiguity where none exists.

Ultimately, even if decedent's will disposed of her entire estate at the time she executed it, the analysis would be no different. That is, even if her will did dispose of everything she owned at the time she executed the will, it still did not contain a residuary clause nor did it contain general devises or bequests. Since her will did not contain a dispositive provision applicable to the after-acquired property at issue here and since she did not change her will to take into account her new undisposed of assets, those undisposed of assets pass by intestacy. Section 732.101(1), Florida Statutes; *In re: Estate of Barker.*

In short, while petitioner argues that decedent's will express no intention that after-acquired property would not pass under the will, by not including any general devises or a residuary clause, that is precisely the intention reflected on the face of the will. The intent of the testator should be gleaned from the face of the will. "The law of wills is calculated to avoid speculation as to the testator's intent and to concentrate upon what he said rather than what he might, or should, have wanted to say." *In re Pratt's Estate*, 88 So. 2d 499, 504 (Fla. 1956); *Pajares v. Donahue*, 33 So.3d 700 (Fla. 4th DCA 2010) (Same).

On its face, the will only disposes of the items specifically devised and bequeathed. It does not state whether it lists all property owned at the time of execution and it does not make provision for disposition of property that she would acquire after that date. It only disposes of the listed property. On its face then, the will disposes of the listed property and leaves anything else, whether decedent owned it at the time or acquired it thereafter, to pass under the laws of intestacy.

It is well-settled that a court must assume that the testator mean what she said in her will. "Stated another way, the inquiry is not what the testatrix meant to say, but what she meant by what she did say." *In re: Estate of Barker* at 32. "It is not the purpose of the court to make a will or to attempt to improve on one that the testator has made." *Id.*, *quoting* 18 Fla.Jur.2d Decedent's Property s. 358 at p.216.

Thus, if a will does not contain a residuary clause, the court ought not add one. In light of this, decedent's will expresses an intent to only pass the property listed.

CONCLUSION

The Court should not turn Section 732.6005(2) into something it has never been based upon petitioner's form over substance rules of statutory construction argument. Instead, the Court should, consistent with the substance over form statutory construction arguments contained herein, answer the certified question in the negative.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: James J. Taylor, Jr., Esquire, P.O. Box 2000, Keystone Heights, FL 32656 and Robert W. Goldman, Esq., The 745 Building, 745 12th Avenue South, Suite 101, Naples, FL 34102, on this 17th day of August, 2012.

Respectfully submitted,

KANEY & OLIVARI, P.L.

/s/ Jonathan D. Kaney III
JONATHAN D. KANEY III
Florida Bar No. 23426
Jake@KaneyOlivari.com
JONATHAN D. KANEY JR.
Florida Bar No. 0115251
Jon@KaneyOlivari.com
55 Seton Trail
Ormond Beach, FL 32176
ATTORNEYS FOR RESPONDENTS